

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MELISSA BOHANNAN, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	CASE NO. 1:16-CV-272-WKW
)	[WO]
INNOVAK INTERNATIONAL,)	
INC.,)	
)	
Defendant.)	

ORDER

Before the court is Innovak’s motion for summary judgment. (Doc. # 62.)

As the party moving for summary judgment, it is Innovak’s burden to “show[] that there is no genuine dispute as to any material fact *and* [that it] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a) (emphasis added). Yet Innovak waited until its reply brief to discuss Plaintiffs’ claims under Counts 3, 4, and 5. (Doc. # 74, at 7–13.) “[D]istrict courts, including this one, ordinarily do not consider arguments raised for the first time on reply.” *Park City Water Auth. v. N. Fork Apartments, L.P.*, No. 09-CV-0240-WS, 2009 WL 4898354, at *1, *1 n.2 (S.D. Ala. Dec. 14, 2009) (citing cases from over 40 districts applying the rule in 2009 alone); *Belfast v. Upsilon Chapter of Pi Kappa Alpha Fraternity at Auburn Univ.*, 267 F. Supp. 2d 1139, 1147–48 (M.D. Ala. 2003); *see also Herring v. Sec’y, Dep’t of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (“As we repeatedly have

admonished, “[a]rguments raised for the first time in a reply brief are not properly before a reviewing court.” (alteration in original) (quoting *United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994)).)

The Eleventh Circuit has recognized that a district court has discretion to allow a sur-reply brief in such a situation. See *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 (11th Cir. 1987). Although Plaintiffs have not moved to file one, in the interest of fairness and to avoid even a whiff of prejudice, the court will *sua sponte* grant Plaintiffs leave to file a sur-reply brief to respond *only* to Innovak’s arguments regarding summary judgment for Counts 3, 4, and 5. See *Lu v. Lezell*, 45 F. Supp. 3d 86, 91 (D.D.C. 2014) (“If the movant raises arguments for the first time in his reply brief to the non-movant’s opposition, the [c]ourt may either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply.”).

Accordingly, it is ORDERED that Plaintiffs may, but are not required to, file a sur-reply brief **on or before February 23, 2018**. The brief is limited to discussing Innovak’s motion for summary judgment as to Counts 3, 4, and 5.

DONE this 16th day of February, 2018.

/s/ W. Keith Watkins

CHIEF UNITED STATES DISTRICT JUDGE